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Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

JUANITA M. KREPS, SECRETARY OF COMMERCE, ET AL.,
PETITIONERS

v.

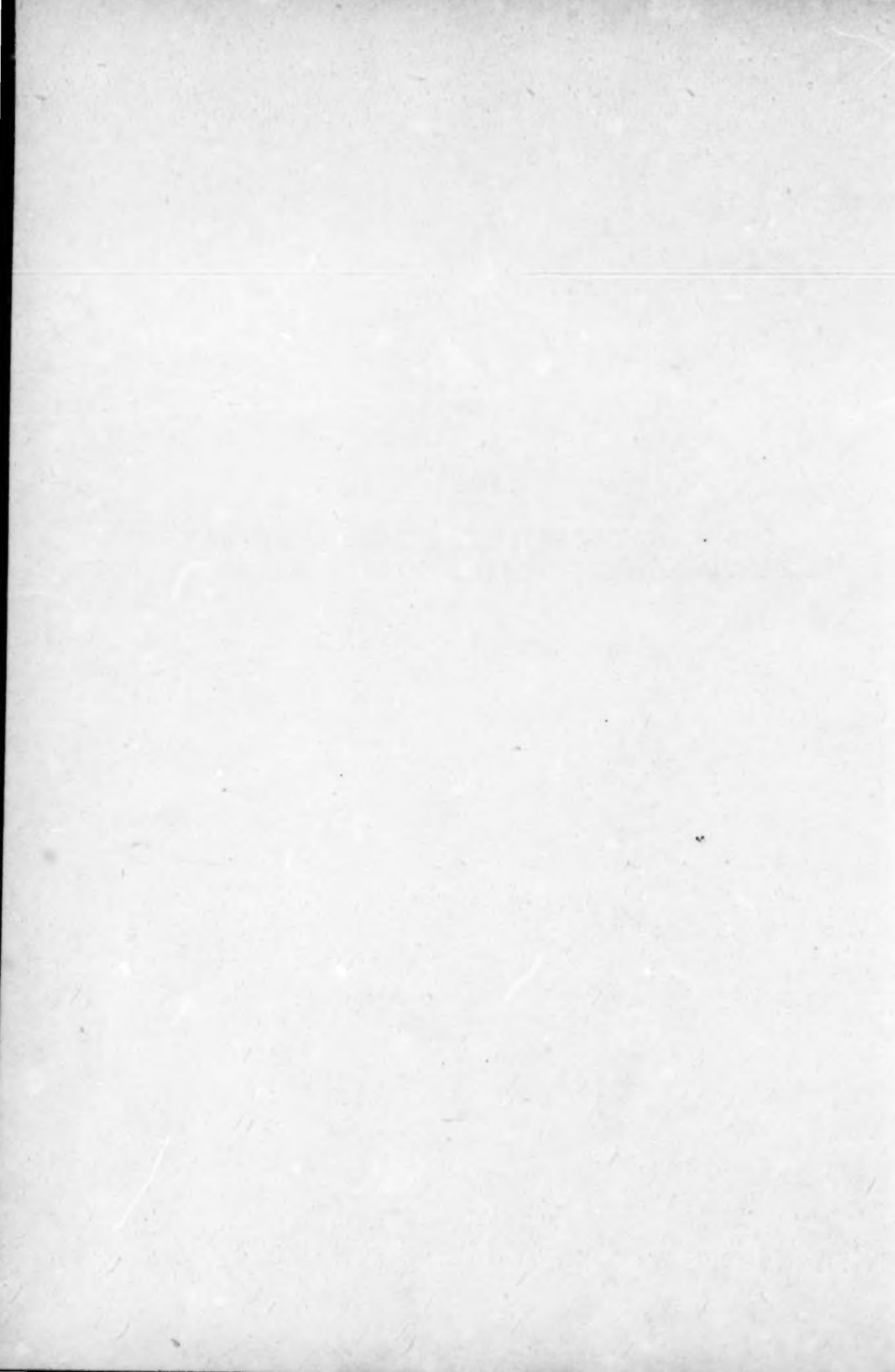
MARSHALL P. SAFIR, ET AL.

**CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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v.

MARSHALL P. SAFIR, ET AL.

**CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of the Secretary of Commerce and the Maritime Subsidy Board, cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case, but only if the Court grants the petition for a writ of certiorari (No. 76-1505) that respondent Safir has filed.

OPINIONS BELOW

The opinion of the court of appeals (No. 76-1505, Pet. App. A, pp. 1a-17a)¹ is reported at 551 F. 2d 447. The order of the district court (No. 76-1505, Pet. App. D, p. 55a) is unreported.

¹The petition for a writ of certiorari of respondent Safir was filed with the Court on April 29, 1977. Since the appendix to that petition contains the opinions of the courts below and other relevant documents, we have not reprinted them here.

JURISDICTION

The judgment of the court of appeals (App., *infra*) was entered on February 11, 1977. On May 6, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 11, 1977, and on June 3, 1977, he further extended the time to and including July 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent Safir has standing to maintain this suit to review the Secretary's action.

STATUTORY PROVISION INVOLVED

Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue

therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

1. Respondent Safir was the owner of 50 percent of the stock of Sapphire Steamship Lines, Inc., which began operations as a common carrier by water in March 1965. Sapphire Lines offered rates that undercut those of competitor shipping lines, all of whom were members of a conference known as the Atlantic and Gulf American Flag Berth Operators ("AGAFBO"), and many of whom, unlike Sapphire Lines, received operating-differential subsidies from the Secretary of Commerce under Section 601(a)(4) of the Merchant Marine Act of 1936, 49 Stat. 2001, as amended, 46 U.S.C. 1171(a)(4). In response, AGAFBO reduced its rates for the carriage of cargo on those routes where its members competed with Sapphire Lines. Sapphire Lines lost business thereafter and was adjudged a bankrupt in May 1967.

The Federal Maritime Commission conducted an investigation of AGAFBO's action, as well as other "practices surrounding the procurement of * * * cargoes," and found that "AGAFBO's rates were contrary to the public interest because they were predatory in nature * * * " (11 FMC 263, 264, 283). The Commission concluded that the AGAFBO rate structure violated Section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U.S.C. 814. 11 FMC at 287.²

²The Justice Department thereafter sought civil penalties from the offending lines under the Shipping Act. See Investigation of Alleged Section 810 Violation, 12 Shipping Regulation Reports 1105, 1108-1109 (December 1972).

After the Commission's ruling, Safir and Sapphire Lines, through its Trustee in Bankruptcy, brought suit in the United States District Court for the Eastern District of New York, asserting that Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, which prohibits the payment of subsidies to lines engaged in unfair practices, required the Secretary, acting through the Maritime Subsidy Board,³ to stop paying subsidies to all AGAFBO lines and to recover all subsidies paid to those lines in the past. The district court dismissed the suit on the ground, *inter alia*, that plaintiffs lacked standing. *Safir v. Gulick*, 297 F. Supp. 630 (E.D. N.Y.).

The Second Circuit reversed, ruling that Sapphire Lines had standing to sue to question the failure of the Maritime Subsidy Board to seek recovery of subsidies paid during the period of violation. *Safir v. Gibson*, 417 F. 2d 972; No. 76-1505, Pet. App. W, pp. 221a-231a (*Safir I*). The court remanded the case so that the Board could "give clear indication that it has properly exercised the discretion with which Congress has endowed it." 417 F. 2d at 978; No. 76-1505, Pet. App. W, p. 231a.

On remand the Board commenced an administrative proceeding to determine whether Section 810 had been violated by the AGAFBO carriers and, if so, whether subsidies should be recouped (MSB Docket S-243). The proceeding was suspended when Sapphire Lines moved in the district court for an order enjoining the Board from making further subsidy payments to the AGAFBO lines. The district court denied the motion.

³The Secretary has delegated responsibilities relating to the award, amendment, and termination of subsidy contracts to the Maritime Administration and Maritime Subsidy Board. Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840.

The court of appeals affirmed the denial of the injunction but held that the Federal Maritime Commission's determination that the AGAFBO carriers had violated Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, also conclusively determined, for the purposes of the Maritime Subsidy Board proceeding, that the AGAFBO carriers had violated Section 810 of the Merchant Marine Act. *Safir v. Gibson*, 432 F. 2d 137 (C.A. 2), certiorari denied, 400 U.S. 850; No. 76-1505, Pet. App. V, pp. 209a-220a (*Safir II*). The court explained, however, that it was not requiring the Board to recoup all subsidies. 432 F. 2d at 145 n. 2; No. 76-1505, Pet. App. V, p. 220a n. 2. See also No. 76-1505, Pet. App. S, p. 204a (opinion on denial of rehearing).

2. The Board thereafter resumed proceedings and in April 1973 determined that \$2.4 million should be recovered from those AGAFBO lines in direct competition with Sapphire Lines (the "trade lines") (No. 76-1505, Pet. App. N, pp. 104a-176a).⁴ This amount, while substantially less than the amount paid out in subsidies during the time those lines were found to have violated Section 810 of the Act, was based upon the nature and extent of each line's participation in the illegal conduct and upon consideration of several mitigating factors (No. 76-1505, Pet. App. N, p. 127a). The Board determined additionally that it would not impose sanctions on the AGAFBO lines that were not in competition with Sapphire Lines (the "non-trade lines").

AGAFBO appealed the Board's decision to the Secretary of Commerce (see 46 C.F.R. 202). The Secretary affirmed the Board's order with respect to the nontrade lines and

⁴During the course of the proceedings before the Board, *Safir* brought five separate suits seeking either to enjoin continued payment of subsidies to AGAFBO lines or to have interlocutory review of the Board's decision not to recover the entire amount of subsidies paid to the lines during the period of violation. His requests were all denied. The courts' decisions are described at No. 76-1505, Pet. 12-14.

reduced the amount to be recouped from the trade lines to \$1.1 million (No. 76-1505, Pet. App. E, pp. 56a-57a).

Respondent Safir then brought this suit for review of the Secretary's decision in the United States District Court for the District of Columbia, asserting, *inter alia*, that the Secretary has an inflexible, non-discretionary duty under Section 810 to recover all subsidies paid to all AGAFBO steamship lines during the period of violation. On cross motions for summary judgment the district court dismissed the complaint (No. 76-1505, Pet. App. D, p. 55a).

The court of appeals reversed and remanded (No. 76-1505, Pet. App. A, pp. 1a-17a). Drawing support from the Second Circuit's holding in *Safir I* that Sapphire Lines had standing to sue for enforcement of Section 810 under the circumstances there presented, the court of appeals determined that the question of Safir's standing in this case depended upon whether he was a "potential competitor" of AGAFBO and it concluded that he was (No. 76-1505, Pet. App. A, p. 7a). On the merits, the court held that the Secretary is not under a mandatory duty to recoup all subsidies paid during the period AGAFBO was in violation of Section 810; the court remanded, however, for further proceedings to consider, *inter alia*, Safir's claim that the decision of the Secretary constituted an abuse of discretion (No. 76-1505, Pet. App. A, pp. 13a-17a).

REASONS FOR GRANTING THE PETITION

Safir has filed a petition for a writ of certiorari seeking review of the court of appeals' holding that the Secretary is not under a mandatory duty to recoup all subsidies paid to AGAFBO lines during the period that they were in violation of Section 810 of the Act (No. 76-1505). We intend to oppose that petition. Should the Court grant Safir's petition, however, it should also grant the present petition,

in order to preserve the Secretary's and the Maritime Subsidy Board's right to argue in this Court that Safir lacks standing to maintain this suit to review the Secretary's action.⁵

In order to establish his standing to maintain this suit, Safir must show both that he is a person "adversely affected or aggrieved" by the Secretary's decision, within the meaning of Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, and that he has standing as a constitutional matter. He has shown neither.

1. Under the statutory scheme that the Secretary administers, Safir is not "adversely affected or aggrieved" by the Secretary's decision. Section 810 of the Merchant Marine Act of 1936 makes it unlawful for American carriers by water "receiving an operating-differential subsidy" under the Act to engage in practices that are "unjustly discriminatory or unfair to any other citizen * * * who operates a common carrier by water * * * ." The Section provides two different and independent sanctions for offending shipping lines: first, "[n]o * * * subsidy * * * shall be paid * * * to any [carrier] who shall violate this section"; second, any person injured by a violation has a right of action for triple damages.

The second statutory sanction provides a full and completely adequate remedy for the victim of a statutory violation. Indeed, Sapphire Lines, in a lawsuit brought by its Trustee in Bankruptcy, has pursued that remedy

⁵Although a cross-petition would not appear to be necessary where the objection to be raised, as it is here, is that the lower courts had no jurisdiction to consider the case, see *Peoria Ry. Co. v. United States*, 263 U.S. 528, 535-536; *Mattingly v. N. W. Virginia Railroad*, 158 U.S. 53, 57, we are filing this conditional cross-petition out of an abundance of caution. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26. But cf. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

successfully.⁶ In these circumstances, the victim, or any person whose claim derives from privity with the victim, cannot be said to be adversely affected or aggrieved by the manner in which the Secretary enforces the first statutory sanction. Enforcement of that sanction is exclusively the Secretary's responsibility. Respondent Safir, as a stockholder in Sapphire Lines who asserts an interest in entering the shipping industry himself, should not be heard to challenge the Secretary's method of enforcement.

2. In suits brought to review agency action "the constitutional standing requirement * * * [is] allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38-39. No such allegations were made here. The court of appeals characterized Safir as a "potential competitor," relying solely upon an affidavit filed by him in 1969 indicating that he "desired to return to the shipping business as soon as possible" (No. 76-1505, Pet. App. W, p. 231a), and an allegation made in the complaint in this case that he "is desirous of re-entering the shipping industry" (Complaint, p. 2).⁷ But these allegations fail to show that

⁶Sapphire has settled and released its claims. *J. Read Smith, As Trustee of the Estate of Sapphire Steamship Lines, Inc. (Bankrupt) v. AGAFBO* (D.D.C., Civil Action No. 2130-66), discussed in *In Re Sapphire Steamship Lines, Inc.*, 509 F. 2d 1242, 1243-1244 (C.A. 2).

⁷The court of appeals relied upon the decision of the Second Circuit in *Safir I*, which granted standing to Sapphire Lines (and, the court here held, to Safir as well) for the limited purpose of questioning the failure of the Maritime Subsidy Board to seek any recovery of subsidies. In view of the subsequent decisions of this Court in such cases as *Warth* and *Eastern Kentucky Welfare Rights Organization*, it is doubtful whether the Second Circuit, if presented today with the *Safir I* case, would reach the same result on the standing issue.

Moreover, the Second Circuit's finding of standing was based upon its understanding that Sapphire Lines' operations had only been temporarily "interrupted" and that, as attested to in the affidavit of Safir

Safir has in fact been injured by the Secretary's decision only partially to recoup the trade lines' subsidies.

Moreover, Safir has not shown how a reversal of the Secretary's refusal to recoup more would inure to his benefit. The recouped subsidies would be returned to the public treasury, not turned over to Safir. If Safir at present is unable to enter the shipping industry, he has not shown how "if the court affords the relief requested, [this] inability [would] be removed." *Warth v. Seldin*, 422 U.S. 490, 504. On the other hand, if he now has the resources to enter the industry, any argument that a withdrawal of subsidies from the trade lines would enhance his competitive position would be impermissibly based upon unsupported speculation. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, No. 75-904, decided January 25, 1977. In short, Safir has failed to demonstrate "that he personally would benefit in a

then before the court, it would return to the shipping business "as soon as possible." Thus the court stated (417 F. 2d at 978; No. 76-1505, Pet. App. W, p. 230a; emphasis added):

Sapphire was forced out of business by the violation of § 810, and plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. *Without deciding whether a potential competitor or a former victim who has washed his hands of the business would have an interest protected by § 810*, we hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the protection of § 810 with regard to raising the issue of the Administrator's refusal to seek recovery of past payments.

Eight years have passed since the Second Circuit delivered its opinion; ten years have passed since Sapphire Lines ceased operations. A hiatus of ten years is clearly something more than a mere "interruption" of service. For this reason, even if Sapphire Lines would now lack standing under the Second Circuit's de

tangible way from [judicial] intervention." *Warth v. Seldin*, *supra*, 422 U.S. at 508. See also *Linda R. S. v. Richard D.*, 410 U.S. 614.

Accordingly, Safir has failed to demonstrate "an actionable causal relationship between [the Secretary's] actions and [his] asserted injury." *Warth v. Seldin*, *supra*, 422 U.S. at 507. Sapphire Lines was injured by the actions of AGAFBO, and it has proceeded to recover damages under Section 810. But neither Sapphire Lines nor Safir has been injured by the Secretary's actions in enforcing Section 810, and since Safir is unable to show "concrete facts demonstrating that the challenged [agency action] harm[s] him," he has no standing to bring suit. *Warth v. Seldin*, *supra*, 422 U.S. at 508 (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be granted, but only if the Court grants the petition in No. 76-1505.

Respectfully submitted.

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JULY 1977.

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 75-2050

MARSHALL P. SAFIR, APPELLANT

v.

**JUANITA M. KREPS, INDIVIDUALLY AND AS SECRETARY
OF COMMERCE, ET AL**

SEPTEMBER TERM, 1976

CIVIL 74-1474

*Appeal from the United States District Court for
the District of Columbia.*

**Before: WRIGHT, MCGOWAN AND MACKINNON,
Circuit Judges**

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher

George A. Fisher
Clerk

2a

Date: February 11, 1977

Opinion for the Court filed by Circuit Judge Wright.